UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6

MURRAY AMERICAN ENERGY, INC. AND THE MONONGALIA COUNTY COAL COMPANY, A SINGLE EMPLOYER

and **Case 06-CA-215195**

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, LOCAL 1702, AFL-CIO, CLC

MURRAY AMERICAN ENERGY, INC. AND THE HARRISON COUNTY COAL COMPANY, A SINGLE EMPLOYER

and **Case 06-CA-218979**

UNITED MINE WORKERS OF AMERICA, DISTRICT 31, AFL-CIO, CLC

ANSWERING BRIEF OF THE CHARGING PARTIES

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COME NOW the charging parties, the United Mine Workers of America District 31 and United Mine Workers of America Local Union 1702, and through undersigned counsel hereby submit this Answering Brief in the above-captioned cases.

I. INTRODUCTION

The Charging Parties (collectively, the "UMWA" or "Union") filed the underlying unfair labor practice charges in this matter pursuant to Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act") (29 U.S.C. §§ 158(a)(1), (5)) after the Respondents (collectively, "Murray") failed to provide – or, in one instance, delayed substantially in providing – information that the UMWA had requested. The facts to which the parties have stipulated show that the UMWA requested information relevant to its duty to represent certain Murray employees; that the UMWA apprised Murray of the relevance of its requests and that moreover, the circumstances surrounding the requests put Murray on notice of their relevance; that Murray has failed to prove that the Union's requests were burdensome; that to the extent that the Union's requests might be challenging for Murray to fulfill – which the UMWA does not concede – Murray has failed to make a good-faith effort to reach an accommodation with the Union; that the UMWA was not required to, and indeed could not, narrow the scope of its requests; and that the UMWA was not required to bargain over sharing Murray's costs of responding to the Union's requests.[1] Murray therefore violated Sections 8(a)(1) and 8(a)(5), and the Board

[1] These facts are stated in the parties' Joint Motion and Stipulation of Facts and explicated further at pp. 5-12 of the Brief of the Charging Parties in this matter. This Answering Brief will not recapitulate these facts in detail. Instead, the UMWA incorporates pp. 5-12 of its opening Brief here by reference.

therefore should require the company to provide the requested information to the UMWA without further delay.

II. ARGUMENT

A. The UMWA requested relevant information.

In January and February 2018, UMWA Local Union 1702 (the "Local") made eight requests to the Murray American Energy/Monongalia County Coal Company single-employer entity ("Murray/Monongalia") for subcontractor invoices, the number of subcontractor employees doing work at the Monongalia County Mine, and descriptions of all such employees' work over the course of various time periods between January 1, 2018 and February 19, 2018. JX 7; JX 9; JX 10; JX 13; JX 15(b); JX 16; JX 18. The UMWA also made substantially similar requests to the Murray American Energy/Harrison County Coal Company single-employer entity regarding subcontracting at the Harrison County Mine. *See* JX 24 at 2 (describing these requests as dealing with the same subject-matter as the Local's requests to Murray/Monongalia). In each request to Murray/Monongalia, the Local specified that it needed the information to determine whether to file a grievance regarding Murray/Monongalia's subcontracting and/or to determine the merit of an existing grievance or grievances on that subject. *Id*. When Murray questioned the relevance of these requests, the Local specified that they pertained to its obligation to police compliance with Article 1 – and, more specifically, Article 1A – of the parties' collective bargaining agreement, which substantially restricts the company's use of subcontractors. JX 12; JX 15(a).

Murray/Monongalia made no further inquiries into the relevance of the information the Local had requested and, in fact, confirmed in writing that the company understood the contractual provisions to which the Local's requests pertained. JX 17 at 1. Murray did not, as it

now claims, continue to argue to the UMWA that the information that the UMWA requested was irrelevant. Brief of Respondents (hereinafter "RB" at 12). Instead, Murray *questioned* the information's relevance, and the UMWA provided clarification. JX 8; JX 11; JX 12; JX 15(a). Murray's claim to the contrary, that the "Union did not even attempt to establish the relevance of contracting work relating to non-bargaining unit employees," is therefore a blatant misrepresentation of the stipulated factual record. RB at 12.

Further, Murray declined to list relevance among the issues that it wished to dispute in this case. Joint Motion and Stipulation of Facts (hereinafter "Stip.") at 14. By submitting these matters directly to the National Labor Relations Board (the "Board") with a stipulated record, the parties have waived a hearing and briefing before an administrative law judge (an "ALJ"). Therefore, Murray's failure to identify the relevance of the information requested by the Union as a disputed issue is tantamount to failing to argue or brief the issue before an ALJ and failing to preserve the issue in exceptions to the ALJ's decision. Murray, therefore, has forfeited its relevance claim before the Board. *See H&M Int'l Transp., Inc.*, 363 NLRB No. 189 at *1 (2016), *enf'd sub nom. H&M Int'l Transp., Inc. v. NLRB*, 719 Fed. Appx. 3 (D.C. Cir. 2018) (internal citations omitted) (finding that the employer waived an argument by failing to present it at the ALJ hearing, in its post-hearing brief, in its exceptions to the ALJ's decision, and in its brief in support of such exceptions).

Additionally, Murray cannot make a good-faith claim that the UMWA "sought information regarding all contracting performed for Respondents, not just contracting that could have affected bargaining unit work." RB at 11. To the contrary, the UMWA clearly specified that it was concerned with subcontracting that could potentially violate the contractual subcontracting restrictions, and Murray clearly understood that this was the Union's intent. However, Murray

demanded that the UMWA narrow its requests to particular subcontractors, projects, and/or grievances. JX 17 at 1; JX 21 at 1; JX 30(a) at 1; JX 30(b) at 1. In most instances, the UMWA could not do so because all information regarding which subcontractors worked at the relevant mines and which projects they worked on was in Murray's sole possession. JX 15(a). Nevertheless, when the UMWA was able to connect specific information requests to certain pending grievances, it did so. JX 24.

Under *Murray American Energy, Inc.* (366 NLRB No. 80 (2018), *enf'd sub nom. Murray Am. Energy, Inc. v. NLRB*, 765 Fed. Appx. 443 (D.C. Cir. 2019)), it is plain that the UMWA requested relevant information. The UMWA asked for nearly identical information in both that case and this one, and in both cases, Murray was on notice of the relevance of the information's relevance due to longstanding and recurring disputes with the UMWA regarding subcontracting. Further, in both cases, the UMWA explained in nearly identical terms that the information was relevant to the Union's representational duties. In this case, therefore – as in *Murray American Energy* – the UMWA has "satisfied its duty to show the relevance of its request…" *Id*. at *30.[2]

The Board has already determined that *NLRB v. Wachter Construction, Inc.* (23 F.3d 1378 (8th Cir. 1994)), which Murray cites in an effort to disprove the relevance of the information the UMWA requested, does not compel a different conclusion. RB at 12-13. This is so because the court's decision that the union requested irrelevant information turned on evidence that the union sought the information in order to harass the employer into foregoing certain rights under the relevant collective bargaining agreement; the union did not seek the information for the purpose of representing bargaining-unit employees. *See id*. at 1382

[2] Notably, Murray has made no effort to distinguish the facts of *Murray American Energy* from the factual record in this case – and indeed, there exists no reasonable basis from which Murray could do so.

(reproducing statements from a labor leader, whose example the relevant union followed, explaining his intent to make deliberately burdensome information requests regarding non-union subcontractors in order to persuade employers to discontinue awarding work to them); *see also id*. at 1380 (finding that "the union's predominant purpose…was to harass the employers and force them to cease a practice permitted under the collective bargaining agreement").

When – as in this case – such evidence is absent, *Wachter* is irrelevant. *Murray Am. Energy*, 366 NLRB at *31 n.39; *"Automatic" Sprinkler Corp.*, 319 NLRB 401, 416 (1995), *enf. denied on other grounds sub nom. "Automatic" Sprinkler Corp. v. NLRB*, 120 F.3d 612 (6th Cir. 1997). This is all the more true when, as here, the union affirmatively explains the relevance of the requested information and when the union has outstanding grievances related to the subject-matter or the requested information. *Ormet Aluminum Mill Prods. Corp.*, 335 NLRB 788, 805-06 (2001). Even the court that decided *Wachter* has clarified that its holding does not apply without evidence that the union intended to harass the employer via information requests. *Supervalu, Inc. – Pittsburgh Div'n v. NLRB*, 184 F.3d 949, 952-53 (8th Cir. 1999). The stipulated record in this case contains no such evidence, and Murray does not even attempt to argue that the UMWA intended to harass the company.

Likewise, *Island Creek Coal Company* (292 NLRB 480 (1989), *enf'd sub nom. Island Creek Coal Co. v. NLRB*, 899 F.2d 1222 (6th Cir. 1990)), also cited by Murray, does not indicate that the Union's explanation for the relevance of its requests was inadequate. RB at 12. There, the UMWA requested subcontractor information and stated only that it needed the materials "to intelligently and effectively represent the bargaining unit." *Id*. at 482. None of the Union's requests initially "explained why the Union desired the information," and the Union's statement regarding intelligent and effective representation was insufficient, on its own, to apprise the

employer of the relevance of the requested information. *Id*. at 483, 490. Importantly, however, the UMWA later supplemented its explanation by specifying contractual provisions related to its requests that it suspected the employer of violating. *Id*. at 487. Based on this explanation, the Board found that the UMWA had requested relevant information. *Id*. at 489.[3] The same conclusion applies to this case, where the UMWA explained the import of the information it requested from Murray at the time it made its requests and where the Union later specified the contract provisions to which the requests were relevant.

Further, it is clear under *Murray American Energy* that the UMWA was not obligated to narrow the scope of its information requests for Murray's convenience. Indeed, the UMWA could not do so because the Union did not have sufficient details regarding Murray's use of subcontractors to enable the UMWA to specify the subcontractors and projects that appeared to be taking bargaining-unit work, in violation of the collective bargaining agreement; this was "precisely the type of information that the Union did not have and was seeking." *Murray Am. Energy*, 366 NLRB at *30; *see also Pratt & Lambert, Inc.*, 319 NLRB 529, 533-34 (1995) (affirming the union's right to make broad-based requests for subcontractor information in order to determine whether the employer had violated contractual subcontracting restrictions and to assess the extent of any such violation, and holding that the employer's demand that the union narrow its requests was "unreasonable").

Disneyland Park (350 NLRB 1256 (2007)), which Murray cites to the contrary, is inapposite. In that case, the union requesting wide-ranging subcontractor information did not

[3] The Board also affirmed that it was appropriate for the UMWA to seek subcontractor information "*in order to determine* whether a contract violation had occurred," as the Union has done in this case, even though – as here – the UMWA lacked concrete evidence of such a violation. *Id*. at 488 (emphasis in original) (internal citations omitted).

allege that the employer had violated the collective bargaining agreement, nor did the context of the union's requests put the employer on notice of a contractual dispute regarding subcontracting. *Id*. at 1258-59. Here, the UMWA stated clearly to Murray – on a number of occasions – the Union's belief that the company's subcontracting violated the parties' collective bargaining agreement, and the parties had been embroiled in at least fifteen arbitrations involving subcontracting. Stip. at 13; *Murray Am. Energy*, 366 NLRB at *30 (finding that *Disneyland Park* does not apply to requests nearly identical to the ones in this case because, as here, the UMWA informed Murray of its belief that the company's subcontracting violated the collective bargaining agreement's detailed and extensive subcontracting restrictions); *see also Teachers College, Columbia Univ. v. NLRB*, 902 F.3d 296, 306 (D.C. Cir. 2018) (distinguishing the *Disneyland Park* requests for information about contractually-permitted subcontracting from requests for information about subcontracting that appeared to violate the relevant contract). It is clear, therefore, that the UMWA requested relevant information from Murray and that the Union was under no obligation to restrict its information-gathering simply because Murray did not wish to comply with its obligations under the Act.

B. Murray violated the Act by failing to provide certain grievance-related information and by unacceptably delaying the provision of other such information.

Certain of the Union's information requests to Murray were related to specific subcontracting grievances. JX 24; JX 25; JX 26; JX 27. Murray has yet to provide the requested information that is related to grievances 1702-31-18 and PP-5-18, and the company delayed for nearly two months in providing the information related to grievance PP-4-18 – only providing it when the parties were a mere four days away from arbitrating the matter. Stip. at 12. The information that the UMWA requested is relevant to the Union's fulfillment of its

representational duties for the reasons stated in Section II(A), *supra*. Therefore, to the extent that Murray failed to provide it, the company violated the Act.

Likewise, it is well-settled that Murray's delay in providing relevant information is a violation tantamount to failing to provide it at all. *Centura Health*, 368 NLRB No. 51 at *6 (2019) (internal citation omitted). More specifically, Murray's delay is well within the range that the Board has held to be unlawful. *Monmouth Care Ctr.*, 354 NLRB 11, 52 (2009), *reaff'd*, 356 NLRB 152 (2010), *enf'd sub nom. Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012). Further, given that Murray declined to dispute that the company could have obtained the requested information easily, it is clear that Murray failed to meet its responsibility of providing the information as promptly as possible under the circumstances. *See Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 n.9 (1993) (internal citation omitted) (requiring the employer to provide relevant information requested by the union "as promptly as circumstances allow").

Yet, Murray makes the unsupported claim that its inaction is somehow excused because the parties settled grievance 1702-31-18; they held grievance PP-5-18 in abeyance pending the outcome of grievance PP-4-18, and the Union subsequently withdrew it; and that Murray's delayed response allegedly did not prejudice the UMWA in the arbitration of grievance PP-4-18. RB at 11 n.5; *see also* Stip. at 11-12 (explaining the resolution of the grievances). Importantly, Murray has forfeited this argument for the reasons discussed in Section II(A), *supra*. Further, Murray is simply incorrect; the company was bound to provide the UMWA with information relevant to these grievances despite the fact that they later settled or were otherwise resolved. *See Grand Rapids Press*, 331 NLRB 296, 300 (2000) (holding, "the Respondent is obligated to supply the Union with the requested information, even if the underlying grievances for which it was requested settled while the Union's information request was being litigated…").

The underlying principle is that "[t]he right of a union to requested information is determined by the situation that existed at the time of the request." *E.I. Du Pont de Nemours & Co.*, 346 NLRB 553, 581 (2006), *enf'd sub nom. E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007) (*citing Grand Rapids Press* as *Booth Newspapers, Inc.*, 331 NLRB at 300). At the time that the UMWA requested information relevant to the aforementioned grievances, each of them were live issues between the parties. The fact that they were resolved later, as nearly all grievances are, is irrelevant. Further, the stipulated record in this case contains no support for Murray's contention that the UMWA was not prejudiced by the company's delay in providing information relevant to grievance PP-4-18; the record does not address the matter of prejudice at all. Reasonably, if one is to draw any logical inference regarding the impact of Murray's delay, it is that the delay was in fact detrimental to the UMWA. It is hard to imagine how Murray's decision to withhold the details of the subcontracting that was at the heart of the grievance until four days before the parties had to present their arguments would not have compromised the Union's ability to arbitrate the dispute. In any case, however, Murray cites no authority for the proposition that an alleged lack of prejudice excuses the company's delay. Indeed, Murray remained responsible for providing the requested information as soon as reasonably possible, and the company violated Sections 8(a)(1) and 8(a)(5) in failing to do so.

C. The UMWA was not required to bargain with Murray over sharing any costs allegedly incurred by the Union's information requests.

Murray has repeatedly conditioned the fulfillment of the Union's information requests on the Union's willingness to pay the company's entire cost of responding. JX 17; JX 19; JX 21; JX 30(a); JX 30(b). Murray has also periodically stated a desire to negotiate a cost-sharing scheme with the UMWA. JX 28; JX 32. When the UMWA asked Murray to explain and quantify the cost burden allegedly imposed by the Union's requests, the company did so only regarding a

single request and stated that its response – which Murray had prepared but has never provided to the UMWA – cost approximately $300.00. JX 21. Meanwhile, Murray agrees that each of its subsidiaries involved in this case take in over $100 million in annual revenue. Stip. at 5.

Given that fact, Murray's claim of having incurred a $300.00 expense, including the cost of nine hours of employee work time, is insufficient to prove that the Union's requests posed an undue financial burden. These numbers fall well below the threshold at which the Board has required a union to bargain over cost-sharing. *See Gen. Motors Corp.*, 243 NLRB 186, 198 (1979), *enf'd as modified sub nom. Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980) *and modified on reh'g*, 1981 WL 27197 (D.C. Cir. Jan. 22, 1981) (requiring bargaining when the employer asserted that it would take between 18,000 and 20,000 employee hours to respond to the union's request) *and United Aircraft Corp.*, 192 NLRB 382, 389 (1971), *enf'd in part sub nom. Lodges 743 & 1746, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *supplemented sub nom. United Aircraft Corp.*, 247 NLRB 1042 (1980), *enf'd sub nom. NLRB v. United Aircraft Corp.*, 661 F.2d 910 (2d Cir. 1981) *and sub nom. Lodges 743 & 1746, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 661 F.2d 909 (2d Cir. 1981) (requiring bargaining when the employer had spent over $50,000 responding to the union's request).

Notably, even in *United Aircraft Corp.*, which Murray cites for its claim that the UMWA must bargain over cost-sharing, the Board required such bargaining only after the employer made the data that was responsive to the union's requests available to the union, and the union continued to demand that the employer compile that data into reports that were expensive to prepare. 192 NLRB at 389. Here, Murray made no effort to make any responsive data at all available to the UMWA. *United Aircraft Corp.*, therefore, does not apply to the facts of this case.

Additionally, *American Telephone and Telegraph Co.*, also cited by Murray, is inapposite because the Board ordered bargaining over cost-sharing only after the union offered to pay the employer a flat rate for providing the requested information, and the Board – in keeping with its generalized preference for negotiated agreements – wanted the parties to discuss and come to a consensus regarding a reimbursement rate. *See* 250 NLRB 47, 47 n.2 (1980), *enf'd sub nom. Commc'n Workers of Am. v. NLRB*, 644 F.2d 923 (1st Cir. 1981) (ordering bargaining); *see also id*. at 56 (noting the union's request to reimburse the employer $0.10 per page for photocopies). The UMWA has made no such offer here, and it was not required to do so.

Importantly, *American Telephone & Telegraph Co.* did "not involve a refusal to furnish information," and the Board did not discuss the circumstances under which a union must bargain over cost-sharing with an employer, like Murray, that refuses to respond to an information request. *Id*. at 50; *see also Yeshiva Univ.*, 315 NLRB 1245, 1249 (1994) (stating that *American Telephone & Telegraph Co.* "concerned only the form or manner in which the information was supplied"). Accordingly, the Board holds that *American Telephone and Telegraph Co.* does not stand for the proposition that the employer need not prove its cost burden before the union is obligated to bargain over cost-sharing; instead, the opposite is true, and the employer must indeed demonstrate that it is cost-burdened. *See Tower Books*, 273 NLRB 671, 675 (1984), *enf'd sub nom. Queen Anne Record Sales, Inc. v. NLRB*, 772 F.2d 913 (9th Cir. 1985) (claiming, in dissent, that *American Telephone and Telegraph Co.* allowed the employer to demand bargaining without proving its burden); *id*. at 671-72 (holding to the contrary).

Moreover, Murray's refusal to quantify the expense involved in responding to any of the Union's requests beyond the one that allegedly cost $300.00 meant that the company could not demonstrate that it was burdened. Absent such proof, the UMWA was under no obligation to pay

for Murray's compliance with the Act or to bargain over sharing in the company's compliance costs. *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1327 (2006), *overruled on other grounds by E.I. DuPont de Nemours, Louisville Works*, 364 NLRB No. 113 (2016); *Hosp. Episcopal San Lucas*, 319 NLRB 54, 57 (1995); *I. Appel Corp.*, 308 NLRB 425, 442 (1992), *enf'd sub nom. NLRB v. I. Appel Corp.*, 19 F.3d 1433 (6th Cir. 1994); *Tower Books*, 273 NLRB at 671 n.5 (internal citation omitted). Murray's citation to *Food Employer Council, Inc.* (197 NLRB 651 (1972)) to prove the contrary is incorrect. There, the Board held, "*If* there are substantial costs involved" in the employer's response to the Union's information requests, *then* "the parties must bargain in good faith as to who shall bear such costs." *Id*. at 651 (emphasis added). This holding confirms that proof of substantial costs is a prerequisite for the union to have any bargaining obligation regarding cost-sharing. *Minn. Mining & Mfg. Co.*, 261 NLRB 27, 33 (1982), *enf'd sub nom. Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). That is, *Food Employer Council* provides "a sound basis in the law for the Union's request that the Respondent demonstrate a burdensome financial impact before the Union would discuss costs." *Tower Books*, 273 NLRB at 671 n.5.

More specifically, and contrary to Murray's claim, the company's mere assertion that it was cost-burdened by the Union's requests did not obligate the UMWA either to assume the company's costs or to bargain over cost-sharing. RB at 13. As support, Murray cites *United Parcel Service of America, Inc.* (362 NLRB 160 (2015)), where the union requested a large volume of irrelevant information, failed to respond to the employer's suggested accommodations, and refused to explain why it needed the requested information. *Id*. at 162-63, 173. All of these circumstances contributed to the Board's decision to require the union to share in the employer's costs; the employer's assertion that the union's requests posed an undue

financial burden was not dispositive. Importantly, none of these circumstances is present here; the information requested by the UMWA is relevant for the reasons stated in Section 11(A), *supra*; Murray offered no accommodations to the Union; and the UMWA clearly explained that the Union needed the information to police compliance with the contractual subcontracting restrictions and to assess the merit of pending and potential grievances on the subject.[4] In *this* context, Murray must prove that its cost of fulfilling the Union's requests is unacceptably burdensome before the UMWA is obligated to bargain over sharing those costs. Murray has not done so.

Notably, Murray had the opportunity to prove its cost burden not only through communications with the UMWA but through the presentation of evidence in this litigation – but in each instance, Murray declined to do so. In addition to refusing to provide comprehensive cost information to the UMWA, Murray did not enter any such information into the stipulated record. Moreover, by proceeding to the Board based on that record, Murray forewent the opportunity to present testimony regarding its alleged cost burden. Under these circumstances, Murray's claim that the Union's requests imposed an undue financial burden are inappropriately conclusory, self-serving, and not to be relied upon. *See Yeshiva Univ.*, 315 at 1249 (finding the employer's vague and unverified statements regarding the burden imposed by the union's requests, along

[4] While Murray claims that it offered to accommodate the UMWA, that assertion is patently incorrect. RB at 14. Instead, Murray first demanded that the UMWA pay its entire cost of providing the requested information and later demanded that the Union bargain over cost-sharing, which it was not required to do. The UMWA, meanwhile, offered an accommodation on multiple occasions (going above and beyond what the Act required of the Union) in the form of a procedure that would enable Murray to periodically notify the Union about subcontractors working at UMWA-represented mines, thereby eliminating the need for the Union's broad-based information requests – but Murray failed to respond. JX 23; JX 29; JX 31.

with the employer's failure to present testimony to support its claims, was inadequate to prove that the employer was cost-burdened).

Additionally, even if the Board were to find that the UMWA must bargain with Murray regarding cost-sharing – and the Union specifically disputes that such a finding is appropriate – the appropriate time to consider that issue would be at the compliance stage of this proceeding, should it progress to that stage. Murray's belief that the UMWA must share in its costs of responding to the Union's requests is not, under any circumstances, an adequate reason to deny providing the requested information outright, as Murray has done here. *Int'l Union of Elec., Radio & Mach. Workers*, 648 F.2d at 26; *Yeshiva Univ.*, 315 NLRB at 1249; *Tower Books*, 273 NLRB at 671.

Further, despite Murray's claims to the contrary, the UMWA was not required to narrow the scope of its requests for the company's convenience – and indeed, the Union could not do so under the circumstances. RB at 14. "The Union is not limited to requesting information for specifically named or even specifically-contemplated grievances, or requests for specifically referenced incidents." *Murray Am. Energy*, 366 NLRB at *30. This is the case because "[c]learly, such information" – that is, the information required to narrow the Union's requests to "some particular type of work, contractor, project or pending grievance" – "is not in the Union's possession and constitutes an unreasonable request." *Pratt & Lambert*, 319 NLRB at 534; RB at 14. Under the circumstances of this case, the UMWA simply was not obligated to alter its requests to make it easier or less expensive for Murray to respond – if indeed substantial effort or expense were involved, which the company has not proven. Murray's failure to provide the information, therefore, represents a violation of Sections 8(a)(1) and 8(a)(5).

D. The UMWA made its information requests in good faith.

An employer must respond to all of a union's good-faith requests for relevant information. The Board presumes that the union acts in good faith and will endorse the union's action as long as "at least one reason for [its] demand can be justified." *Hawkins Constr. Co.*, 285 NLRB 1313, 1314 (1987), *enf. denied on other grounds sub nom. NLRB v. Hawkins Constr. Co.*, 857 F.2d 1224 (8th Cir. 1988) (*citing Associated Gen. Contractors of Cal.*, 242 NLRB 891, 984 (1979), *enf'd as modified sub nom. NLRB v. Associated Gen. Contractors of Cal.*, 633 F.2d 766 (9th Cir. 1980)). Here, the UMWA clearly justified its information requests by explaining to Murray that the Union needed the subcontractor information to determine whether to file grievances regarding the company's use of subcontractors and to determine the merit of existing grievances on the subject. JX 7; JX 9; JX 10; JX 13; JX 15(b); JX 16; JX 18. The UMWA later specified that the Union needed the information to assess Murray's compliance with the restrictions on subcontracting contained in certain articles of the parties' collective bargaining agreement, which articles the UMWA listed for Murray. JX 12; JX 15(a). When the Union's requests were tied to specific subcontracting grievances, the UMWA specified them. JX 24. These purposes were legitimate for the reasons stated in Section II(A), *supra*. It is clear, therefore, that the UMWA acted in good faith.

Murray has forfeited any opportunity to pursue its claims to the contrary, for the reasons stated in Section II(A), *supra*. Further, "[b]ad faith is an affirmative defense that must be pled and proved by the Respondents." *Island Creek Coal*, 292 NLRB at 489 n.14 (*citing Hawkins Constr.*, 285 NLRB at 1322 n.20). Yet, not only did Murray fail to identify this issue in the stipulated record as one that the company would argue in this case, Murray also failed to list it among the affirmative defenses in the company's Answer to Consolidated Complaint. Stip. at 14.

Murray's defense in its Answer that the UMWA failed to bargain in good faith is not sufficient, given that the parties' generalized good-faith bargaining obligations are the framework that governs this entire proceeding. *See Murray Am. Energy*, 366 NLRB at *24 (*quoting A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011), *enf'd in part sub nom. Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286 (9th Cir. 2011) *and supplemented sub nom. Plaza Auto Ctr., Inc.*, 360 NLRB 972 (2014) (internal citations omitted)) (stating that the employer's duty to bargain in good faith encompasses "a general duty to provide information needed by the bargaining representative in contract negotiations and administration"). Murray's claim that the UMWA failed to fulfill this broad obligation is distinct from a defense that the Union did not uphold its narrower obligation to make information requests in good faith. Because Murray did not plead this specific defense at any time prior to its brief in this matter, the company has lost the opportunity to make its argument. RB at 14-16.

Further, Murray's arguments for the Union's supposed bad faith are ineffective. Murray urges the Board to apply the analysis of the Eighth Circuit, which holds that a union makes an information request in bad faith when, "under all the surrounding facts and circumstances," the union's "predominant purpose…was one of bad faith." *Wachter Constr.*, 23 F.3d at 1386 n.8. This request is misguided, given that the Eighth Circuit "applied a different standard than that utilized by the Board." *Ormet Aluminum Mill Prods.*, 335 NLRB at 805; *see also "Automatic" Sprinkler Corp.*, 319 NLRB at 416 (stating that on this point, "the Board disagreed with the circuit court").

Even if the Board applied the Eighth Circuit's *Wachter Construction* standard, however – which the UMWA does not concede to be appropriate – it still would be clear that the Union acted in good faith. In *Wachter Construction*, the employer produced documentary evidence

showing that the union requested large volumes of subcontractor information in order to harass the employer into ceasing its practice of awarding work to non-union subcontractors, which was expressly permitted under the relevant collective bargaining agreement. 23 F.3d at 1387. As the Eighth Circuit later confirmed, these facts formed the foundation of its bad-faith holding. *See Supervalu, Inc.*, 184 F.3d at 952-53 (distinguishing *Wachter Construction* on the basis that there was "specific evidence" that the union intended to harass the employer into discontinuing a contractually-permitted activity while in the case at hand, there was "no evidence of such harassment or coercion"). When such facts are absent, *Wachter Construction* does not apply. *Murray Am. Energy*, 366 NLRB at *31 n.39; *Ormet Aluminum Mill Prods.*, 335 NLRB at 805-06; *"Automatic" Sprinkler*, 319 NLRB at 416.

Here, the stipulated record contains no evidence that the UMWA used its information requests to harass Murray and/or to persuade the company to discontinue a practice permitted under the parties' collective bargaining agreement. Murray does not even argue that such evidence exists. Instead, it is clear that the UMWA sought subcontractor information to fulfill its responsibilities to police Murray's compliance with the contractual restrictions on subcontracting and to pursue grievances on that subject when the Union believed them to be meritorious. Under no circumstances, therefore, does *Wachter Construction* support a finding that the UMWA acted in bad faith. Likewise, *United Parcel Service of America*, in which the Board declined to uphold the Administrative Law Judge's bad-faith finding, does not support Murray's claims. 362 NLRB at 161.

Murray's specific objections to the Union's conduct also fail to show that the UMWA acted in bad faith. First, Murray claims that the UMWA refused to discuss potential accommodations for its requests and refused to acknowledge the company's concerns about

them. RB at 15. However, the UMWA proposed an accommodation in the form of the pre-notification procedure regarding subcontractors working at the mines involved in this case – it was Murray that declined to discuss the matter. JX 23; JX 29; JX 31. Further, the Union acknowledged Murray's concerns both by offering this accommodation and by providing legal authority to demonstrate that the UMWA need not bargain over cost-sharing regarding its requests. JX 22; JX 31. The Union was not required to negotiate over Murray's so-called "accommodations" of either bearing the company's response costs or of sharing in those costs, for the reasons stated in Section II(C), *supra*. Additionally, neither the volume of the Union's requests nor the Union's persistence in making them proves bad faith. *See Murray Am. Energy*, 366 NLRB at *31 (stating that the fact that the union "was more aggressive" in making its requests "than the Respondent would like does not even begin to make out a claim of bad faith") *and Mission Foods*, 345 NLRB 788, 788 (2005) (holding that the employer's complaint of voluminous information requests "is insufficient to overcome the presumption of good faith").

Second, Murray argues that the UMWA requested information about all subcontractors working at the relevant mines in bad faith because the Union represented only certain employees working at those mines. Therefore, only certain types of subcontracting could arguably be prohibited by the collective bargaining agreement. RB at 15. Yet, the UMWA not only told Murray that the Union needed the information for purposes related to subcontracting grievances – thereby communicating the Union's understanding that certain types of subcontracting were permitted while others were not – but the UMWA also specified the contractual articles (the ones restricting subcontracting) that gave rise to the Union's need for information. Murray confirmed its understanding that the UMWA was interested in information related to its obligation to police the company's compliance with those articles by citing them back to the Union as the mutually-

understood basis for the Union's requests. JX 17. The UMWA therefore believed the parties to be operating with a common understanding of the subcontracting that was the source of the Union's concern. Had that not been the case, Murray could have requested further clarification at any time – but the company did not do so.

Fourth, Murray claims that the fact that many of the Union's requests were substantially identical, but for the periods of time to which they pertained, indicates bad faith. RB at 16. However, a union's use of standardized forms for information requests does not prove that the union intended to harass the employer or that the union acted with any other improper motive – particularly where, as here, the union made its requests in connection with multiple pending grievances and an ongoing dispute over a single aspect of the parties' relationship. *Ormet Aluminum Mill Prods.*, 335 NLRB at 805.

Fifth, Murray asserts that the Union's decision not to bargain over cost-sharing is indicative of bad faith. RB at 16. However, the UMWA acted well within its rights in this regard for the reasons stated in Section II(C), *supra*.

Finally, Murray argues that the UMWA refused to explain the relevance of its requests. RB at 16. This is patently false, as explained earlier in this Section and in Section II(A), *supra*. In its explanations, as in all other matters pertaining to this case, the UMWA acted in good faith and in compliance with the Act. To prove the contrary, Murray must demonstrate "that the only purpose for the [Union's] request[s] was a bad-faith purpose" – and Murray has not done so. Murray therefore cannot use false allegations regarding the Union's motives to excuse the company's violations of Sections 8(a)(1) and 8(a)(5). *Six Star Cleaning & Carpet Servs., Inc.*, 359 NLRB 1323, 1330 (2013).

E. The Board should not adopt a proportionality rule to govern Murray's obligation to provide relevant information to the UMWA.

Murray must provide any information requested by the UMWA that is relevant to the Union's enforcement and administration of the collective bargaining agreement. Information regarding non-bargaining unit employees is not presumptively relevant to these purposes, and the UMWA must therefore prove its relevance (which – as stated in Section II(A), *supra* – the Union has done). *Murray Am. Energy*, 366 NLRB at *24 (*quoting A-1 Door & Building Solutions*, 356 NLRB at 500 (internal citation omitted)). The UMWA, however, does not carry a heavy burden of proof in this regard; instead, the Board applies "a broad, discovery-type of standard" under which the Union need show only that the requested information "is of 'probable' or 'potential' relevance" to its representational duties. *Id*. (*quoting Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006), *supplemented*, 2007 WL 1459443 (NLRB May 14, 2007) (Shamwell, ALJ) *and Transp. of New Jersey*, 233 NLRB 694, 694 (1977) (internal citation omitted)).

This rule is based on the liberal standard that federal courts have historically applied when considering the relevance of information sought during discovery in civil matters, as governed by Federal Rule of Civil Procedure ("Federal Rule") 26(b). *See Am. Benefit Corp.*, 354 NLRB 1039, 1052 n.19 (2010) (identifying Rule 26(b) as the "schema on which the 'broad discovery-type standard' followed by the Board is based"). Importantly, however, the Board is not bound by the Federal Rules of Civil Procedure. While the Board takes guidance from the Federal Rules when it finds them useful, it does not hesitate to substitute its own policies and procedures when, in the Board's judgment, those practices better suit its unique position in enforcing the Act. *See, e.g.*, National Labor Relations Board, *NLRB Division of Judges Bench Book* i (Judge Jeffrey D. Wedekind, ed., 2019) (stating that the Board "frequently seeks guidance from the Federal Rules"); *see also id*. at § 3-220 (explaining that the Board's rules, not the

Federal Rules, govern the content of complaints filed with the Board); § 3-500 (providing that decisions interpreting Federal Rule 8 "may provide useful guidance" to the Board); § 4-200 (stating that document service in Board proceedings is governed by the Act and the Board's rules rather than by the Federal Rules); *and* § 8-230 (stating that the Federal Rules are not binding on the Board (*citing Brink's, Inc.*, 281 NLRB 468, 468-69 (1986)).

Yet, Murray argues that the Board should dispense with the standard it has long used to determine the relevance of information sought by a union in favor of one that mirrors the post-2015 version of the Federal Rules. RB at 16-18. This newly-amended version allows a party seeking discovery to obtain relevant information only insofar as the information's subject-matter is "proportional to the needs of the case" considering, among other factors, "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). The amended rule also permits a party subject to a discovery request to seek and obtain a protective order to shield the party from, among other adverse impacts, "undue burden or expense" associated with responding to discovery requests. Fed. R. Civ. P. 26(c)(1).

Murray claims that the Board "must" adopt this rule solely because the growth in electronically-stored information that may be subject to UMWA information requests has somehow made the Board's existing standard unworkable. RB at 18. This argument, however, is not at all reflective of the facts of this case. At no point, including in the brief where the argument appears, does Murray prove (or even claim) that any of the information requested by the UMWA in this matter is stored electronically. Therefore, even if the Board were inclined to consider adapting its information request rules to account for the existence of large volumes of electronic data within employer record-keeping systems (which the UMWA would not support), such action would be unnecessary and inappropriate here.

Murray also asserts that under its proposed revised standard, "there can be no question" that the Union's requests were so burdensome and expensive as to excuse Murray from responding to them. RB at 18. Yet, Murray has utterly failed to prove that the company is cost-burdened by responding to the Union's requests, for the reasons stated in Section II(C), *supra*. As a result, even if the Board were to alter its rules as Murray proposes – which the UMWA does not advocate – the hypothetical newly-updated rule would not absolve the company from liability for its failure to respond to the Union's requests for relevant information.

The Board is under no obligation to act on Murray's suggestion to conform its rules to the Federal Rules, the reason that the company offers for doing so bears no relation to the facts at hand, and even if the Board were to make the change, Murray still would have violated Sections 8(a)(1) and 8(a)(5) of the Act. The Board, therefore, should reject Murray's request and should retain the discovery-type standards for information requests that have long served the purposes of the Act successfully.

III. CONCLUSION

The UMWA repeatedly sought subcontractor information from Murray that was relevant to the Union's responsibilities of policing the company's compliance with contractual restrictions on subcontracting and to vindicating UMWA members' rights when Murray appeared not to have complied with those restrictions. Murray had a duty to provide the information but did not do so; the fact that grievances to which certain of the Union's requests pertained were settled or otherwise resolved is irrelevant. The UMWA acted in good faith to obtain information necessary to represent its members, and given the lack of any evidence whatsoever that the Union's requests imposed an undue financial burden on Murray, the UMWA was under no obligation to bargain over sharing in the company's response costs. The Board

should not and need not upend its longstanding rules governing Murray's duty to respond to the Union's requests. Instead, the Board should find that Murray violated Sections 8(a)(1) and 8(a)(5), order the company to provide the requested information to the UMWA, post a notice affirming its employees' rights under the Act, and take any additional action necessary to remedy Murray's repetitive and unlawful stonewalling of the Union's efforts to represent its members as the Act intends.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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